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9 UNITED STATES DISTRICT COURT  
10 CENTRAL DISTRICT OF CALIFORNIA

11 **JOSHUA ASSIFF,**

12 **Plaintiff,**

13 **v.**

14 **COUNTY OF LOS ANGELES;**  
15 **SHERIFF DEPUTY BADGE**  
16 **NUMBER 404532;**  
17 **And DOES 1 through 10,**

18 **Defendants.**

**Case No. 2:22-cv-05367 RGK (MAAx)**

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN OPPOSITION TO  
DEFENDANTS' MOTION IN LIMINE  
#4**

Action Filed: August 3, 2022  
Pretrial Conference: July 10, 2023  
Trial Date: July 25, 2023

Assigned to: Hon. R. Gary Klausner,  
District Judge, Courtroom 850

20  
21 Plaintiff, JOSHUA ASSIFF (hereinafter "Plaintiff") hereby respectfully  
22 submits the following memorandum of points and authorities in opposition to  
23 Defendants' motion in limine #4 to exclude or limit the testimony of Plaintiff's expert  
24 Jeffrey Nobel.

25 **I. INTRODUCTION**

26 Plaintiff is a 21-year old black male and a student at Antelope Valley College  
27 where he plays basketball. Plaintiff was driving from his home to a teammate's house  
28 in order to carpool to basketball practice. For no apparent reason and without

1 probable cause, KELLY, a male Caucasian motorcycle Sheriff deputy, pulled  
2 Plaintiff over. For no apparent reason and without probable cause, KELLY – as well  
3 as other deputies who subsequently responded to the call – all tasered, choked, pepper  
4 sprayed, beat and arrested Plaintiff. Plaintiff has asserted the First Cause of Action  
5 against KELLY for violation of 42 USC § 1983 (arrest without probable cause and  
6 with excessive force).

## 7 **II. MR. NOBEL’S OPINIONS SATISFY THE *DAUBERT* STANDARD**

8 Expert testimony may be excluded if the underlying reasoning or methodology  
9 is invalid or irrelevant to the issues in the case. [See, *Daubert v. Merrell Dow*  
10 *Pharmaceuticals, Inc.* (1993) 509 U.S. 579, 592, 113 S.Ct. 2786, 2796—trial judge  
11 must ensure that any and all testimony or evidence admitted is not only relevant, but  
12 reliable.] In exercising the “gatekeeping role” mandated by *Daubert, supra*, the trial  
13 court generally will hold a “Daubert hearing” pursuant to Federal Rules of Evidence  
14 Rule 104(a) to determine the reliability and relevance of expert testimony. [*Allison v.*  
15 *McGhan Med. Corp.* (11th Cir. 1999) 184 Fed.3d 1300, 1306; *Daubert v. Merrell*  
16 *Dow Pharmaceuticals, Inc. (Daubert II)* (9th Cir. 1995) 43 Fed.3d 1311, 1318, fn.  
17 10; *Weaver v. Blake* (10th Cir. 2006) 454 Fed.3d 1087, 1089—Daubert hearing held  
18 on plaintiff's motion in limine]

19 As set forth in detail in his report, Mr. Nobel is a very qualified expert with  
20 over 35 years of experience in the field of police use of force; pursuits; police  
21 administration; training; police operations; criminal investigations; interviews and  
22 interrogations; civil rights violations and investigations; internal/administrative  
23 investigations; criminal investigations; police discipline; citizen complaints; and  
24 police policies and procedures. (Nobel Report p. 4, ¶ 7)

25 He reviewed sufficient information concerning the incident to make informed  
26 opinions. (Nobel Report p. 4, ¶ 8)

27 His methodology of forming his opinions was reliable, because they were  
28 based on a comprehensive review of the provided materials that establishes his

1 understanding of the facts of the case and on the professional and generally accepted  
2 principles and practices in policing as of the date of this incident. “Generally accepted  
3 practices” refers to those protocols, techniques, and procedures that are widely  
4 known, acknowledged, and relied upon in the field. A practice is generally accepted  
5 when well-educated, well-trained, and experienced professionals would agree that it  
6 is conventional, customary, and reasonably standard. Generally accepted practices in  
7 policing reflect technical and specialized knowledge in the law enforcement field. A  
8 practice can be generally accepted without necessarily being universally adopted or  
9 rising to the level of a long-established, empirically validated best practice.  
10 Generally accepted practices may be, but are not necessarily, reflected in Department  
11 of Justice consent decrees, publications by professional associations (such as the  
12 International Association of Chiefs of Police, the Police Executive Research Forum,  
13 the National Police Foundation, etc.), in agency policies, and in reputable training  
14 materials. (Nobel Report p. 5, ¶ 12)

15 To identify and apply the applicable generally accepted practices in policing,  
16 Mr. Nobel relied upon his knowledge, skill, experience, training, and education in  
17 law enforcement. This includes work his field of study as a policing scholar and  
18 author; his knowledge of historical and contemporary law enforcement standards and  
19 methods; and the relevant professional and academic literature. He employed a  
20 similar methodology when he conduct professional evaluations of police officers or  
21 agencies as a consultant and when writing for reputable academic and professional  
22 publishers. The methodology he applied in this case is consistent with the  
23 methodology utilized by other experts in the field of law enforcement when analyzing  
24 incidents of this type. (Nobel Report p. 5, ¶ 13)

25 His use of terminology such as “excessive,” “unreasonable,” and  
26 “disproportionate,” etc., is intended to and should be read as references to the  
27 professional and generally accepted standards in policing and is not intended and  
28

1 should not be interpreted as references to or the application of legal standards within  
2 the sole province of the factfinder or judge. (Nobel Report p. 5, ¶ 14)

3 This case clearly involves issues of generally accepted police practices. Mr.  
4 Nobel is well qualified in the field, and his opinions are reliable and will assist the  
5 jury in deciding this case.

6 **III. MR. NOBEL’S OPINION ABOUT PASSIVE RESISTANCE IS**  
7 **ADMISSIBLE**

8 Defendants argue that Mr. Nobel should be precluded from stating the opinion  
9 that Plaintiff’s resistance was “passive.” Defendants’ objection to this proffered  
10 testimony derives from the fact that they do not necessarily understand it. There were  
11 times during the encounter where Plaintiff Assiff’s resistance might be characterized  
12 as active, but there are other times where his resistance was certainly merely passive.  
13 Mr. Nobel’s point is that the level of force used on Plaintiff Assiff -- while he was  
14 only passively resisting -- was unwarranted and inconsistent with generally accepted  
15 police practices. This is something that would be made clear in cross-, if not direct-,  
16 examination. There is no need for an order precluding this testimony.

17 **IV. MR. NOBEL’S TESTIMONY REGARDING DEPUTY CLARK’S USE**  
18 **OF FORCE IS ADMISSIBLE**

19 Defendant Sergeant Kelly was the supervisor on the scene. He instructed  
20 Deputy Clark to assist him in removing Plaintiff Assiff from the vehicle, just like he  
21 instructed Deputy Gallegos to tase Plaintiff Assiff. Thus, Deputy Clark’s excessive  
22 use of force during the incident is relevant to this case. Based upon the obvious visual  
23 evidence captured by Plaintiff Assiff’s mobile phone, as well as Plaintiff Assiff’s  
24 own testimony, it is evident that Deputy Clark attempted to pull Plaintiff Assiff from  
25 the vehicle with a chokehold around Plaintiff Assiff’s neck. Mr. Nobel opines that  
26 this use of force was unreasonable – meaning it was inconsistent with generally  
27 accepted police practices. There is ample evidence from which to base this opinion,  
28 and this opinion is admissible.

**V. MR. NOBEL RESERVED THE RIGHT TO UPDATE HIS OPINIONS  
BASED UPON LATE ARRIVING DISCOVERY**

As explained elsewhere, Defendants were delinquent in providing discovery. Neither Defendant Kelly nor Defendant County of Los Angeles appeared for their properly noticed depositions. The due date for Mr. Nobel's report required him to prepare his report without the benefit of reviewing the deposition testimony of either Defendants. In his report, Mr. Nobel noted that additional depositions were pending and reserved the right to supplement his report upon receipt of this new material. (Nobel Report p. 20, ¶ 48) Since Defendants are responsible for this late discovery, Mr. Nobel should be permitted to take this late discovery into consideration in formulating his opinions.

**VI. CONCLUSION**

For the reasons set forth above, Plaintiff's expert Jeffrey Nobel should be permitted to testify to his opinions in his report and any other opinions based upon late arriving discovery.

DATED: June 30th, 2023

The Law Office Of Thomas M. Ferlauto, APC

By: \_\_\_\_\_



Thomas M. Ferlauto

Attorney For: Plaintiff, JOSHUA ASSIFF